**St. Louis Cardinals, LLC *and* Joe Bell.** Case 14–CA–213219

January 3, 2020

DECISION, ORDER, AND ORDER REMANDING

BY CHAIRMAN RING AND MEMBERS KAPLAN AND EMANUEL

On October 17, 2018, Administrative Law Judge Arthur J. Amchan issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.[2]

The judge found that the Respondent discharged, refused to recall, or refused to recall in a timely manner four statutory employees—Joe Bell, James Maxwell,[3] Eugene Kramer, and Thomas Maxwell—in violation of Section 8(a)(3) and (1) because they engaged in protected activity by filing internal union charges against Patrick Barrett, a statutory supervisor and member of Painters District Council 58 (the Union). For the reasons discussed below, we affirm the judge's finding with respect to Bell, remand to the judge the allegations with respect to James Maxwell and Kramer, and dismiss the allegation with respect to Thomas Maxwell.[4]

1. In agreement with the judge, we reject the Respondent's contention that the four alleged discriminatees lost the Act's protection by acting in contravention of Section 8(b)(1)(B). Section 8(b) applies only to "a labor organization or its agents." 29 U.S.C. § 158(b). It does not pertain to the alleged discriminatees, who, as rank-and-file union members, were neither officers nor agents of the Union. See *Tenn-Tom Constructors*, 279 NLRB 465, 466 (1986) (rank-and-file union members engaged in protected conduct by participating in their steward's filing of internal union charge against supervisor / union member, even though union was assumed to have violated Section 8(b)(1)(B) by imposing discipline as a result of the internal union charge). Because Section 8(b) does not apply to the alleged discriminatees, they could not have lost the Act's protection under Section 8(b)(1)(B) by filing the internal union charges.[5]

2. Barrett testified that the alleged discriminatees' internal union charges factored "a little bit" in his decision not to recall them for the 2018 season, and the judge found that this testimony "essentially concede[d] the alleged [Section 8(a)(3)] violation." The Respondent contends that the judge's finding was incorrect, and we agree. Under *Wright Line*, Barrett's admission only supports a finding that the General Counsel sustained his initial burden of showing that the alleged discriminatees' internal union charges were a motivating factor for Barrett's decision. 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399–403 (1983). The General Counsel having sustained his initial burden, the Respondent is still entitled to an opportunity to show, as an affirmative defense, that it would have decided not to employ the alleged discriminatees even in the absence of their protected activity. Id.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We shall modify the judge's recommended Order to conform to our findings and to the Board's standard remedial language. We shall also substitute a new notice to conform to the Order as modified.

The Respondent urges us to modify our standard remedial relief. We see no reason for doing so at this time.

[3] The judge misidentifies James Maxwell as "Joseph" Maxwell throughout his decision. We correct this inadvertent mistake.

[4] We affirm the judge's finding that the Respondent's Director of Facility Operations, Hosei Maruyama, violated Sec. 8(a)(1) by telling employee Thomas Maxwell, on January 18, 2018, that "there are consequences for actions," referring to the filing of the internal union charges. By this statement, Maruyama implied to Thomas Maxwell that he and the other alleged discriminatees would face negative repercussions because of their protected activity, and this implication had a reasonable tendency to interfere with their Sec. 7 rights. See *Frontier Hotel & Casino*, 323 NLRB 815, 816 (1997), enfd. in relevant part sub nom. *Unbelievable, Inc. v. NLRB*, 118 F.3d 795 (D.C. Cir. 1997).

[5] The Supreme Court has also held that "a union's discipline of one of its members who is a supervisory employee can constitute a violation of Sec. 8(b)(1)(B) only when that discipline may adversely affect the supervisor's conduct in performing the duties of, and acting in his capacity as, grievance adjuster or collective bargainer on behalf of the employer." *Florida Power & Light Co. v. Electrical Workers Local 641*, 417 U.S. 790, 804–805 (1974). Thirteen years later, the Court reiterated its earlier holding by stating that Sec. 8(b)(1)(B) is violated "*only* when an employer representative is disciplined for behavior that occurs *while he or she is engaged in § 8(b)(1)(B) duties*—that is, 'collective bargaining or grievance adjustment, or . . . any activities related thereto.'" *NLRB v. Electrical Workers Local 340 (Royal Typewriter)*, 481 U.S. 573, 582 (1987) (ellipsis and emphasis in original) (quoting *Florida Power & Light Co.*, 417 U.S. at 805). Here, the internal union charges were filed, and Barrett was disciplined, for violating union bylaws by working for nonunion contractors—not for any activities related to collective-bargaining or grievance adjustment.

Notwithstanding his misstatement, the judge properly analyzed whether the Respondent met its *Wright Line* defense burden with respect to Bell. The judge clearly considered Barrett's testimony that he did not recall Bell for the 2018 season because he knew Bell was already working and rejected it as "incredible." Accordingly, the judge appropriately found that the Respondent failed to show that it would have decided not to recall Bell for the 2018 season even if he had not filed the internal union charges.

However, the judge made no similar analysis with respect to James Maxwell and Kramer. Barrett testified that he did not make an offer to James Maxwell because, among other reasons, James Maxwell performed sloppy and unprofessional work, slept on the job, and smoked marijuana on lunch breaks.[6] As to Kramer, Barrett testified that he did not make an offer to Kramer because he had worked with Kramer and personally knew that Kramer performed poor work and smoked marijuana on lunch breaks. (Robert Shamel, the owner of Shamel Construction, corroborated Barrett's testimony regarding the poor quality of Kramer's work.[7]) Unlike with Bell, however, the judge did not discuss Barrett's testimony at all. Although the judge summarily stated that the "Respondent's alternate explanations for not recalling the 4 [alleged discriminatees] are pretextual," we cannot be confident that he gave appropriate consideration to Barrett's testimony as to why he did not recall Kramer and James Maxwell in light of his earlier statement that Barrett's testimony that the union charges factored "a little bit" into his hiring decision "essentially concede[d] the alleged violation." In this context, the judge's failure to address Barrett's serious concerns about the performance and behavior of James Maxwell and Kramer leaves it unclear whether the judge discredited Barrett's testimony or, instead, simply declined to consider it, erroneously believing that the violations were already established by Barrett's admission.

In this situation, we cannot determine whether the judge correctly found that the Respondent violated Section 8(a)(3) by discharging James Maxwell and failing to recall Kramer. Therefore, we shall sever the complaint allegations concerning James Maxwell and Kramer and remand them to the judge for further analysis and findings of whether the Respondent carried its *Wright Line* defense burden.

We find no violation with respect to Thomas Maxwell. Maxwell was recalled for the 2018 season, but the judge found that the Respondent violated the Act by failing to recall him in a timely manner. We disagree. First, under *Wright Line*, the General Counsel must show by a preponderance of the evidence that, in response to protected activity, "the individual's prospects for employment or continued employment have been diminished or that some legally cognizable term or condition of employment has changed for the worse." *Northeast Iowa Telephone Co.*, 346 NLRB 465, 476 (2006); see also *Bellagio, LLC v. NLRB*, 854 F.3d 703, 709-710 (D.C. Cir. 2017) (under *Wright Line*, "[a] finding of unlawful retaliation . . . requires a predicate determination that an employer took an adverse action"). Here, Barrett called Thomas Maxwell on February 5 and 8, 2018, making him third among the eight painters to whom he offered positions for the 2018 season. Painting work at the ballpark did not commence until sometime in March. Nothing in the record indicates that Thomas Maxwell's start date or any other term or condition of his employment would have been different from those of the two painters who were called before he was. Because the order in which Barrett called Thomas Maxwell had no bearing on his terms and conditions of employment, the General Counsel failed to make the threshold showing that Thomas Maxwell suffered any cognizable adverse action under Section 8(a)(3). Cf. *Lancaster Fairfield Community Hospital*, 311 NLRB 401, 403-404 (1993) (finding no violation where the employer's alleged unlawful act did not affect "any term or condition of employment" within the meaning of Section 8(a)(3)).

Even assuming the General Counsel met his initial burden under *Wright Line*, the Respondent met its defense burden. In offering Thomas Maxwell a position for the 2018 season, the Respondent acted in accordance with its usual hiring practices and treated him no differently than the other painters who were hired for that year. Even if Thomas Maxwell had not filed the internal union charges, the Respondent would have sought to recall him at the same time that it actually did seek to recall him—early February, to begin work in March, which Thomas Maxwell would have done if he had accepted the position. Because it did not treat him any differently for filing the internal union charges, the Respondent did not violate Section 8(a)(3) and (1) with respect to the timing of its hiring offer to Thomas Maxwell.

Accordingly, we affirm the judge's 8(a)(3) and (1) findings with respect to Bell, remand to the judge the allegations with respect to James Maxwell and Kramer,

[6] Barrett also testified that another reason for his decision was that James Maxwell said he could not work for Barrett. James Maxwell said this to Director of Facility Operations Maruyama. Barrett testified that Maruyama told him that James Maxwell said he couldn't and wouldn't work with Barrett. The judge expressed skepticism of Barrett's testimony, but he did not clearly discredit it.

[7] Shamel testified that he employed Kramer as a painter once, and Kramer dripped paint onto newly finished floors to such an extent that the floors had to be refinished.

and dismiss the allegation with respect to Thomas Maxwell.

## ORDER

The National Labor Relations Board orders that the Respondent, St. Louis Cardinals, LLC, St. Louis, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recall or otherwise discriminating against employees for engaging in protected activity.

(b) Impliedly informing employees that they are not being retained or recalled because they engaged in protected activity.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Joe Bell full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Joe Bell whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the judge's decision.

(c) Compensate Joe Bell for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 14, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year(s).

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusal to recall Joe Bell, and within 3 days thereafter, notify Joe Bell in writing that this has been done and that the refusal to recall will not be used against him in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its St. Louis, Missouri facility copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 18, 2018.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 14 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint allegations that the Respondent violated Section 8(a)(3) and (1) by discharging James Maxwell and refusing to recall Eugene Kramer are severed and remanded to Administrative Law Judge Arthur J. Amchan for further appropriate action as discussed above. The judge shall prepare a supplemental decision setting forth credibility resolutions, findings of fact, conclusions of law, and a recommended Order. Copies of the supplemental decision shall be served on all parties, after which the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

IT IS FURTHER ORDERED that the complaint allegation that the Respondent violated Section 8(a)(3) and (1) by refusing to recall Thomas Maxwell, or refusing to recall him in a timely manner, is dismissed.

Dated, Washington, D.C. January 3, 2020

John F. Ring, Chairman

Marvin E. Kaplan, Member

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

William J. Emanuel Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to recall or otherwise discriminate against you for engaging in protected activity.

WE WILL NOT impliedly inform you that you are not being retained or recalled because you engaged in protected activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Joe Bell full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Joe Bell whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, less any net interim earnings, plus interest, and WE WILL make him whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Joe Bell for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 14, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year(s).

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful refusal to recall Joe Bell, and WE WILL, within 3 days thereafter, notify Joe Bell in writing that this has been done and that the refusal to recall will not be used against him in any way.

ST. LOUIS CARDINALS, LLC

The Board's decision can be found at www.nlrb.gov/case/14-CA-213219 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

*Bradley A. Fink, Esq.,* for the General Counsel.
*Robert W. Stewart* and *Harrison C. Kuntz, Esqs. (Ogletree, Deakins, Nash, Smoak & Stewart, P.C.),* of St. Louis, Missouri, for the Respondent.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in St. Louis, Missouri, on August 21–22, 2018. Joe Bell filed the initial charge in this matter on January 18, 2018. The General Counsel issued the complaint on April 26, 2018.

The General Counsel alleges that Respondent, the St. Louis Cardinals, violated Section 8(a)(3) and (1) of the Act by discharging paint shop employee James Maxwell on or about January 9, 2018, and refusing to recall and/or rehire paint shop employees, Thomas Maxwell, Joe Bell and Eugene Kramer since about the same date. The General Counsel also alleges that Respondent, on or about January 9 and 18, by its Director of Facility Operations, Hosei Maruyama, violated Section 8(a)(1) by telling an employee that actions have consequences which implied that he and others were not being recalled (or being discharged) due to protected activity.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a limited liability company operates the major league baseball team in St. Louis, Missouri. It annually derives gross revenue in excess of $500,000 and purchases and receives

goods valued in excess of $50,000 directly from points outside of Missouri. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Painters District Council No. 58, of which the alleged discriminatees are members, is a labor organization within the meaning of Section 2(5) of the Act.

## II. ALLEGED UNFAIR LABOR PRACTICES

The Cardinals maintain a paint shop at Busch Stadium. For 34 years Billy Martin was the paint foreman at the Cardinals' ball park. By virtue of its collective bargaining agreement with the Union, the paint foreman must be a member in good standing with District Council 58. Martin was one of two full-time painters employed by the Cardinals.[1] Since 2010, Joseph Maxwell was the other full-time painter. Prior to 2010, Maxwell had been a seasonal painter. For periods of 6–8 weeks, both before the baseball season and afterwards the Cardinals hired somewhere in the vicinity of 6 more seasonal painters.

The Cardinals' general practice was to recall the same seasonal painters year after year (Tr. 375). Thus, Thomas Maxwell had performed seasonal work for Respondent every year since 2006. Eugene Kramer had performed seasonal work every year since 2014 or 2015. Joseph Bell's first year painting for the Cardinals was 2017. Patrick Barrett had worked for the Cardinals since 2006. Mickey Burns and Mark Ochs had also worked for the Cardinals as seasonal painters for at least several years prior to 2017. If a painter was offered seasonal work by the Cardinals while employed, he or she would leave their other job to accept Respondent's offer.

On November 2, 2017, Respondent sent or gave Joseph Maxwell, Thomas Maxwell, and Eugene Kramer a letter indicating that the Cardinals intended to employ them in 2018 (GC Exhs. 10–12). On November 6, all three indicated their intention to work for the Cardinals in 2018. There is no evidence that the Cardinals were unhappy with the quality of the work performed for it by any of the discriminatees.

In the summer or fall of 2017, Martin announced his intention to retire at the end of 2017. Respondent solicited applications for the paint shop foreman position. Director of Facility Operations, Hosei Maruyama interviewed 3 painters to replace Martin: Patrick Barrett, Joe Maxwell, and his brother, Thomas Maxwell. Around Thanksgiving, the Cardinals selected Patrick Barrett for the position despite the fact that Joseph Maxwell had worked for the Cardinals for a longer time and more regularly. Joseph Maxwell, Thomas Maxwell, and Eugene Kramer were unhappy with this selection.

Upon hearing of the selection, Joseph Maxwell called Maruyama in November. He told Maruyama that Barrett was "not a good union guy" and did not deserve the paint foreman position. Maxwell also said he could not work for Barrett. Maruyama testified that he reported this conversation to Barrett and Matt Gifford, the Cardinals' vice-president of operations. It is unclear exactly what he told them about the conversation. Maruyama did not testify that he told Barrett that Maxwell said he could not work for Barrett (Tr. 257). Barrett testified that Maruyama told him that Maxwell couldn't and wouldn't with him (Tr. 301–302). However, he had difficulty recalling the date of this conversation.

A few days later, Joseph Maxwell called Maruyama again to tell him that he would bite his lip and make it (working under Barrett) work. Maruyama did not testify that he reported this conversation to Barrett. Barrett testified that "sometime in January" Maruyama told him that Maxwell would bite his lip and try to make it [painting for Barrett] work (Tr. 325). Barrett's failure to pinpoint dates, makes this testimony irrelevant even if true. There is no evidence that Barrett had made offers of employment to anyone before learning that Joseph Maxwell said that he would "make it work."

Maxwell informed Maruyama that some of the painters would be filing internal union charges against Barrett. Maruyama informed Barrett that the Maxwell brothers would be filing internal union charges against him soon after Maruyama spoke with Joseph Maxwell. Maruyama told Barrett he would have the foreman's job as long as he kept his union card.

On December 4, 2017, Joseph Maxwell, Thomas Maxwell, Joe Bell, and Eugene Kramer filed internal union charges against Barrett with District 58, alleging that contrary to the By-Laws of the Union, Barrett had regularly worked for non-union companies. Barrett worked on and off for non-union contractor Robert Shamel over a 10-year period, apparently with some regularity. Joseph and Thomas Maxwell had been aware of this fact for years but only filed union charges after learning that Barrett had received the paint foreman position with the Cardinals. Thomas Maxwell and Joseph Maxwell also performed work for Shamel on occasion. Eugene Kramer worked for Shamel once.[2]

On January 2, 2018, Pat Barrett assumed the duties of paint shop foreman. On January 3, a union trial board held a hearing on the charges filed against Barrett. Barrett and Joseph Maxwell testified in the hearing. The Union levied a $15,000 fine against Barrett. However, it suspended $12,000 of this amount if Barrett paid $3000 within 90 days. Joseph Maxwell, Thomas Maxwell, Joe Bell, and Eugene Kramer appealed the Trial Board's decision contending that it was too lenient.[3]

[1] Respondent's current foreman, Pat Barrett, disputed this. He testified that Joseph Maxwell was never full-time at the Stadium. I credit Maxwell, but think this fact would only be relevant in a compliance proceeding. It is clear that one painter besides the foreman, worked substantially more hours than others. In 2017, this painter was Joseph Maxwell. In 2018, Mark Ochs worked substantially more than other painters, except for Barrett.

[2] There is no credible evidence that Joe Bell ever performed painting work for nonunion companies while a member of the Union. In the fall of 2017, Barrett told Bell that if he needed side work (i.e., work for a non-union employer) Barrett had a lot of it, Tr. 133. Bell gave Barrett his telephone number, Tr. 134. Respondent did not ask Bell and Bell did not testify that he had ever performed nonunion work while a member of the Union. I decline to credit Pat Barrett's self-serving testimony at Tr. 296–297 that Bell told him he had performed side work previously. I do not regard Barrett as a completely reliable witness inasmuch as his testimony as to the reasons he did not offer Bell work in 2018 is incredible. Thomas Maxwell suggested that Barrett trying to recruit Bell for non-union work motivated the 4 to file charges with the Union.

[3] The record does not reflect when this appeal was filed.

On January 9, Gregg Scott, the Union's Business Manager, and Director of Organizing, Richard Lucks met with Cardinal representatives and informed them that the Union would not seek removal of Barrett from the paint foreman position so long as he paid the $3000 fine on time.

On January 9, 2018, Eugene Kramer had telephone conversations with the Cardinals Director of Facility Operations, Hosei Maruyama. Kramer complained about Barrett's temper. Maruyama told Kramer he left hiring up to Barrett and that Kramer would have to go through the Union's hiring hall if he wanted to work for the Cardinals again. In conversations with Thomas Maxwell on January 18, Maruyama said that actions have consequences, clearly implying that the 4 painters would not be called back by the Cardinals (or at least without going through the hiring hall) because they filed internal union charges against Barrett.[4]

On January 18, 2018, Joseph Maxwell, Thomas Maxwell, Joe Bell and Eugene Kramer filed a grievance pursuant to the Union's collective bargaining agreement with the Cardinals. At a labor-management meeting about the grievance on February 21, 2018, Pat Barrett and Matt Gifford, the Cardinals' Vice-President of Operations, represented Respondent. Respondent and the Union agreed that the Cardinals did not violate their collective bargaining agreement by promoting Barrett to paint shop foreman (R. Exhs. 8–10).

The Cardinals did not go through the hiring hall to obtain seasonal painters when Martin was the foreman. Martin generally recalled the same painters for seasonal work year after year. Barrett continued this practice with regard to painters who did not sign the internal union charges against him.

During the second week of January 2018, Barrett offered Mark Ochs, who worked for the Cardinals in 2017 and did not sign the union charges, work in the winter/spring of 2018. The second painter to get an employment offer from Barrett in January 2018 was Mickey Burns, who also worked for the Cardinals in 2017 and did not sign the union charges. Neither was hired via the Union's hiring hall. Barrett hired other painters who had not worked for the Cardinals in 2017 after offering employment to Ochs and Burns. Only one of these, Duane Oehman, was hired through the Union's hiring hall.

Patrick Barrett initially did not offer employment to any of four discriminatees. On February 5 and 8, after Joseph Bell filed the initial ULP charge in this proceeding, Barrett offered employment to Thomas Maxwell. Maxwell did not respond to the offer. Barrett conceded at the instant hearing that the fact that the 4 had brought internal union charges against him was a factor in his decision not to offer them employment in 2018 (or initially offer Thomas Maxwell employment).

[4] I do not credit Maruyama's testimony at Tr. 264 that when he told Thomas Maxwell that, "actions have consequences," he was referring to James Maxwell telling him that he could not work for Pat Barrett. The recording of the conversation makes it clear that Maruyama and Thomas Maxwell were talking about filing the internal union charges and Thomas Maxwell's assertion that Barrett was continuing to recruit union painters for non-union work. Maruyama and Thomas Maxwell did not discuss Joseph Maxwell or his comment about working for Barrett, GC Exh. 9.

## ANALYSIS

*Respondent, by Hosei Maruyama, violated Section 8(a)(1) by informing Thomas Maxwell that the 4 painters were not offered employment in 2018 because they filed internal union charges against Patrick Barrett.*[5]

In his conversation with Thomas Maxwell on January 18, 2018, Hosei Maruyama, by telling Maxwell that "actions have consequences," implicitly informed Maxwell that the 4 painters who signed the internal union charges against Patrick Barrett would not be offered employment in 2018. In doing so, Maruyama coerced employees in the exercise of their section 7 rights. He did so by inhibiting them in filing and pursing their right to file additional internal union charges or, as they in fact did, appealing the decision of the union trial board. Moreover, the very act of informing an employee that he is unlikely to be hired as the result of protected conduct is itself a violation of section 8(a)(1), *CNN America, Inc.,* 361 NLRB 439, 457 fn. 37, 499 (2014), enfd. in pertinent part, 865 F. 3d 740, 762 (D.C. Cir. 2017). That is particularly so where, as in this case, Respondent had not completed the hiring process for 2018.

*Respondent violated Section 8(a)(3) and (1) by not offering the 4 discriminatees employment in 2018.*

The filing of internal union charges is protected activity. It is an unfair labor practice for an employer to discriminate against an employee for filing internal union charges, *M. J. Electric,* 311 NLRB 1177, 1179, 1183, (1993); *Tracy Towing Line,*166 NLRB 81, 82 (1967).[6]

Respondent, through its agent, Patrick Barrett, admitted that

[5] I find it unnecessary to rule on complaint paragraph 5(A)(i) and (iii) which allege essentially the same violative conduct that I find with regard to paragraph 5(B). The General Counsel would not be entitled to any additional remedy.

[6] The discriminatees' filing of union charges is not any the less protected because they were seeking to remove Pat Barrett from his foreman's position. An analysis of whether these employees' activities are protected depends on whether the identity and capability of the supervisor involved has a direct impact on the employees' own job interests and on the performance of the work they are hired to do, *Senior Citizens Coordinating Council,* 330 NLRB 1100, 1103 (2000). In addition to their concerns about Barrett shortchanging the Union, Kramer and Joseph Maxwell informed Respondent via Maruyama that they would find it difficult to work under Barrett. James Maxwell, Eugene Kramer and Joseph Bell also testified or at least indicated that they were concerned, before they filed the internal union charges, that that Barrett would discharge them.

As a general matter, employees have a protected right to complain about a supervisor and even to seek the supervisor's discharge, when the supervisor's conduct can affect the conditions of their employment, *Calvin D. Johnson Nursing Home,* 261 NLRB 289 (1982), enfd. 753 F.2d 1078(7th Cir. 1983); *Dreis & Krump Mfg., Inc.,* 221 NLRB 309, 315 (1975), enfd. 544 F.2d 320 (7th Cir. 1976); *Avalon Carver Community Center*, 255 NLRB 1064 (1981).

*Bovee & Crail Construction Co.,* 224 NLRB 509 (1976), cited by Respondent is inconsistent with this line of cases. Moreover, it is distinguishable in that the discriminatees in that case were members of the Union's executive board. By contrast, the discriminatees in this case did not hold any position with the Union.

this protected activity factored "a little bit" in its decision not to employ the 4 discriminatees in 2018 (Tr. 321, 392). This essentially concedes the alleged violation because the Board will not seek to quantitatively analyze the effect of the unlawful cause once it has been found. "It is enough that the employees' protected activities are causally related to the employer action which is the basis of the complaint. Whether that 'cause' was the straw that broke the camel's back or a bullet between the eyes, if it were enough to determine events, it is enough to come within the proscription of the Act." *Wright Line,* 251 NLRB 1083, at 1089 fn. 14; accord: *Bronco Wine Co.*, 256 NLRB 53, at 54 fn. 8 (1981).

It is also otherwise clear that Respondent, by Barrett, discriminated against the 4 because they filed the union charges. First of all, Hosei Maruyama implicitly told Thomas Maxwell that the filing of the internal union charge was the reason the four discriminatees would not be working for the Cardinals in 2018. Secondly, Respondent's alternate explanations for not recalling the 4 are pretextual.

Barrett's explanation for not hiring Joe Bell, for example, is obviously pretextual. Barrett testified he did not offer Bell employment because Bell was already working. However, he did not know whether or not the painters to whom he offered employment were working when he offered them employment. Moreover, Barrett knew that in the past the seasonal painters had obtained releases from their employers in order to do seasonal work for Respondent. Barrett did not have any issues with the quality of Bell's work, and was more familiar with Bell's work than with some of the painters he hired instead of Bell (Tr. 360–361).

Hosei Maruyama also told Gene Kramer that the Cardinals had to go through the union hiring hall to obtain seasonal painters, Tr. 261. However, only one of the 5 or 6 seasonal painters hired in 2018 came from the Union's out of work list (Exh. R-1l). Barrett's February 5 and 8 offers of employment to Thomas Maxwell do not detract from the evidence that Respondent discriminated against Thomas Maxwell by not offering him employment earlier. Barrett made this offer after the ULP charges were filed in this case. I infer that was his motivation in extending the offer to Thomas Maxwell. He had no other reason not to recall Thomas Maxwell when he recalled Ochs and Burns.

Respondent's principal defense is that the complaint should be dismissed because the discriminatees engaged in the protected conduct in bad faith. 3 of the discriminatees had violated the Union's rules against working for non-union contractors themselves and had been aware of Barrett's non-union work for years prior to 2017. However, Respondent has cited no cases that support this defense. Board law is in fact to the contrary, *Ohio Valley Graphic Arts, Inc.,* 234 NLRB 493 (1978). Moreover, there is no credible evidence that Joe Bell had violated the Union's by-laws or acted in bad faith.

Finally, Respondent contends that the complaint should be dismissed because the discriminatees violated Section 8(b)(1)(B) in coercing Respondent in its selection of its representative to adjust grievances and 8(b)(4)(B) requiring it to cease doing business with Pat Barrett. Section 8(b) applies to labor organizations and their agents. The Board has never held that rank and file union members can violate Section 8(b). The discriminatees are not a labor organization and are not agents of the Union, See, e.g., *Tenn-Tom Constructors,* 279 NLRB 465 (1986); *Corner Furniture Discount Center*, 339 NLRB 1122 (2003).[7] Moreover, when the discriminatees filed the internal union charges they had no way of knowing that Barrett would represent Respondent in adjusting grievances. Prior to January 2018, the Union had never filed a grievance against the Cardinals. Indeed, when they filed their charges on December 4, Barrett had not been designated as Respondent's representative to adjust grievances.[8]

Finally, Respondent's argument is inconsistent with the Board's decision in *Elevator Constructors (Otis Elevator Co.)* 349 NLRB 583 (2007). The discriminatees did not pursue internal union charges against Barrett for engaging in contract interpretation or grievance adjustment. They filed and pursued these charges because Barrett regularly performed nonunion work and recruited others to perform nonwork. Thus, even if the discriminatees were subject to Section 8(b), they would not have violated that portion of the Act.

## CONCLUSIONS OF LAW

Respondent violated Section 8(a)(3) and (1) in discharging or failing to recall Joseph Maxwell to work in 2018 and in failing to recall Eugene Kramer and Joe Bell. Respondent also violated Section 8(a)(3) and (1) in not recalling Thomas Maxwell in a timely manner.

Respondent, on or about January 18, by its director of facility operations, Hosei Maruyama, violated Section 8(a)(1) by telling Thomas Maxwell that actions have consequences which implied that he and others were not being recalled (or being discharged) due to protected activity.

## REMEDY

The Respondent, having discriminatorily discharged Joseph Maxwell, must offer him reinstatement and make him whole

[7] Respondent's reliance on *Preferred Building Services,* 366 NLRB No. 159 (2018), and *Consolidated Communications,* 367 NLRB No. 7 (2018) is misplaced. First of all, the employees in those cases, unlike the employees in this case, were discharged for conduct that was unprotected. Also, in neither of those cases did the Board conclude that rank and file employees were agents of the Union. Moreover, the facts of *Preferred Building Services*, unlike this one, show substantial involvement of union officials in the conduct for which the employees were discharged. *Consolidated Communications* is not even a Section 8(b) case. The employee in that case was discharged for unprotected conduct which was only tangentially related, if at all, to union activity (endangering company officials on a public highway).

[8] Sec. 3 of Respondent's collective-bargaining agreement, GC Exh. 2, p. 6, states that when a grievance is timely filed "the Employer's Representative or Foreman" and the District Council shall meet jointly within 5 days to resolve the grievance. At the time the discriminatees filed their charges with the Union and on January 3, 2018, when the Union trial board met, they had no way of knowing that Respondent would designate Barrett, as opposed to some other representative, to meet with the District Council to resolve a grievance. That Respondent would designate Barrett as a representative for processing grievances was not clear until February 21, 2018. Even then, it is not clear what was the scope of his authority in that he was accompanied by Matt Gifford, Respondent's vice-president of operations.

for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at therate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB 6 (2010). Respondent shall compensate him for his search-for-work and interim employment expenses regardless of whether those expenses exceed his interim earnings, computed as described above.

The Respondent, having discriminatorily failed to timely recall Joe Bell and Eugene Kramer, must offer them reinstatement and make them and Thomas Maxwell whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB 6 (2010). Respondent shall compensate them for their search-for-work and interim employment expenses regardless of whether those expenses exceed their interim earnings, computed as described above.

Respondent shall file a report with the Regional Director for Region 14 allocating backpay to the appropriate calendar quarters. Respondent shall also compensate the 4 discriminatees for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year, *AdvoServ of New Jersey,* 363 NLRB No. 143 (2016).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[9]

## ORDER

The Respondent, the St. Louis Cardinals, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging, failing to recall, or otherwise discriminating against any employee for engaging in protected activity.

(b) Impliedly informing employees that they are not being retained or recalled because they engaged in protected activity.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Joseph Maxwell, Joe Bell, and Eugene Kramer full reinstatement to their former jobs or, if those jobs no longer exist, to a substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Joseph Maxwell, Thomas Maxwell, Joe Bell, and Eugene Kramer whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Compensate Joseph Maxwell, Thomas Maxwell, Joe Bell, and Eugene Kramer for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 14, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

(d) Compensate Joseph Maxwell, Thomas Maxwell, Joe Bell, and Eugene Kramer for their search-for-work and interim employment expenses regardless of whether those expenses exceed their interim earnings.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its St. Louis facility copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 18, 2018.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. October 17, 2018

## APPENDIX

### NOTICE TO EMPLOYEES
### POSTED BY ORDER OF THE
### NATIONAL LABOR RELATIONS BOARD
### An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

[9] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge, fail to recall, or otherwise discriminate against any of you for engaging in protected concerted activity.

WE WILL NOT inform you implicitly that you are not being offered work due to your protected activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Joseph Maxwell, Joe Bell, and Eugene Kramer full reinstatement to their former jobs or, if those jobs no longer exist, to a substantially equivalent position, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Joseph Maxwell, Thomas Maxwell, Joe Bell, and Eugene Kramer whole for any loss of earnings and other benefits resulting from their discharge or failure to be recalled or timely recalled, less any net interim earnings, plus interest compounded daily.

WE WILL compensate Joseph Maxwell, Thomas Maxwell, Joe Bell, and Eugene Kramer for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file a report with the Regional Director for Region 14 allocating the backpay award to the appropriate calendar quarters.

WE WILL compensate Joseph Maxwell, Thomas Maxwell, Joe Bell, and Eugene Kramer for their search-for-work and interim employment expenses regardless of whether those expenses exceed his interim earnings.

ST. LOUIS CARDINALS, LLC

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/14-CA-213219 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.